

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.** See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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**NOV 16 2009**  
COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

JOSEPH S.,	)	
	)	
	)	2 CA-JV 2009-0058
Appellant,	)	DEPARTMENT A
	)	
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
ARIZONA DEPARTMENT OF	)	Rule 28, Rules of Civil
ECONOMIC SECURITY,	)	Appellate Procedure
NATHAN S., and JONATHAN S.,	)	
	)	
Appellees.	)	
	)	

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APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. JD200600019

Honorable Stephen M. Desens, Judge

AFFIRMED

Patricia O'Connor

Chino Valley  
Attorney for Appellant

Terry Goddard, Arizona Attorney General  
By Claudia Acosta Collings

Tucson  
Attorneys for Appellee Arizona  
Department of Economic Security

H O W A R D, Chief Judge.

¶1 Joseph S., father of Nathan and Jonathan, born in 2006 and 2007, appeals from the juvenile court’s order terminating his parental rights to his children based on mental illness, *see* A.R.S. § 8-533(B)(3), and length of time in care, *see* § 8-533(B)(8)(c).<sup>1</sup> On appeal, Joseph argues there was insufficient evidence to support the court’s findings that his mental illness prevented him from discharging his parental responsibilities, that he was unable to remedy the circumstances that caused the children to be in an out-of-home placement, and that there was a substantial likelihood he would be unable to parent them in the near future. He also challenges the court’s finding that termination of his rights was in the children’s best interests. For the reasons set forth below, we affirm.

¶2 A juvenile court may terminate a parent’s rights if it finds by clear and convincing evidence that any statutory ground for severance exists and if it finds by a preponderance of the evidence that severance is in the child’s best interests. A.R.S. §§ 8-533(B), 8-537(B); *Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 41, 110 P.3d 1013, 1022 (2005). “On review, . . . we will accept the juvenile court’s findings of fact unless no reasonable evidence supports those findings, and we will affirm a severance order unless it is clearly erroneous.” *Jesus M. v. Ariz. Dep’t of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002).

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<sup>1</sup>The mother has filed a separate appeal challenging the termination of her parental rights to these children and to another child who has a different father. *See Hannah S. v. Ariz. Dep’t of Econ. Sec.*, No. 2 CA-JV 2009-0059.

¶3 We view the evidence in the light most favorable to upholding the juvenile court's ruling. *See Michael J. v. Ariz. Dep't of Econ. Sec.*, 196 Ariz. 246, ¶ 20, 995 P.2d 682, 686 (2000). In November 2005, when the mother, Hannah, was pregnant with Nathan, Child Protective Services (CPS) received reports that Hannah was homeless and was neglecting and abusing her then two-year-old daughter, Amethyst, who is not Joseph's child. Shortly after Nathan was born in February 2006, CPS received reports of abuse and neglect as to both children. A week later, upon learning that Hannah had an eleven-year history of mental illness; that she had been diagnosed with psychosis, schizophrenia, and a possible bipolar affective disorder; and that she was not receiving mental health treatment, the Arizona Department of Economic Security (ADES) took custody of Nathan and Amethyst and began to search for Joseph. Except for the first month after they were removed from Hannah's care, Amethyst and Nathan have lived together with their current foster family, who want to adopt them.

¶4 In April 2006, Joseph moved to Sierra Vista to be with Hannah; she became pregnant one month later with Jonathan. Like Hannah, Joseph suffers from mental health problems, including a twenty-year history of schizophrenia and bipolar disorder. In February and March 2006, ADES filed dependency petitions alleging that Joseph had abandoned Nathan and that he did not have any legal right to custody of him. In July 2006, Joseph admitted the allegations in the amended dependency petition, and the juvenile court adjudicated Nathan dependent as to him. Jonathan, who was born in February 2007 without

his right ear canal, is deaf in that ear. Based on reports that Hannah “was out [] of [] control” when Jonathan was born, that she had attempted to hit the nurses and had “pulled the baby’s head out of her vagina and immediately placed him at her chest, ‘almost crushing him,’” conduct Joseph characterized as normal, ADES took custody of Jonathan at birth. ADES filed a supplemental dependency petition as to Jonathan one week after he was born. In July 2007, following a contested dependency hearing, Jonathan was adjudicated dependent as to Joseph. Jonathan has lived with a foster family, albeit not the same family Nathan and Amethyst live with, since birth.

¶5 During the dependency, Joseph was provided with psychological and psychiatric evaluations, participated in both individual and family therapy and visits with the children, and received case management and medication monitoring services. At the February 22, 2007 permanency planning hearing, the juvenile court approved a concurrent case plan goal of family reunification and severance and adoption as to Jonathan. Despite ADES’s efforts and Joseph’s compliance with the services offered, “little to no behavioral changes were demonstrated” by either parent as of May 2007.

¶6 After an additional permanency planning hearing that spanned four days in October and December 2007, the juvenile court allowed the parents “more time to develop the skills and stability needed to parent their children effectively,” despite ADES’s having twice recommended that the case plan be changed to severance and adoption. In December 2008, years after the children had been removed from the parents’ care (almost three years

for Nathan and two for Jonathan), the court changed the case plan goal to severance and adoption, and ADES filed a motion to terminate both parents' rights. After a three-day contested hearing, the court terminated the parents' rights based on mental illness and the children's having been out of the home for fifteen months or longer, pursuant to § 8-533(B)(3) and (B)(8)(c).

¶7 Confirming the conclusions he had made in his written report, psychologist Sergio Martinez, who evaluated Joseph in 2006, testified at the severance hearing that Joseph suffered from schizophrenia, “a devastating mental disorder that seriously interferes with multiple areas of adult responsibility,” that he was “not in a position to adequately care for any child . . . [, and] [a]ny child left under his care without any other source of responsible adult supervision would be at risk of being neglected.” Martinez explained in his report that Joseph lacked a “history of parental responsibility or experience” and that his mental health issues “would interfere in his ability to exercise the needed degree of patience in dealing with the children’s needs for attention, feeding, bathing, dressing, and supervision.” Martinez also concluded that Joseph’s mental condition is likely to continue into the future and that “the prognosis for Joseph to be in a position to exercise his parental duties in a responsible and safe manner is guarded to poor.” Although he acknowledged that he had not seen Joseph since 2006, Martinez noted that he had reviewed and considered the February 2009 evaluation of Steven Hirdes, the psychologist the parents had retained, to support his conclusions.

¶8           Psychologist Daniel Overbeck evaluated Joseph in 2007 and diagnosed him as suffering from a schizoaffective disorder, bipolar type, which he described as a lifelong condition that requires constant management. In a letter to CPS supervisor Robin St. Germain, Overbeck concluded, “[t]here appears to be no scenario of interventions and supports that reasonably might be expected to allow [the parents] to independently parent one, two or all of their children in an effective, consistent and safe manner.” In addition, although Hirdes did not testify at trial, he concluded in his February 2009 report that Joseph suffers from schizoaffective disorder, bipolar type; his capacity to parent adequately is “strongly in doubt,” particularly in stressful circumstances; and he will need ongoing psychiatric care and psychological services for the foreseeable future.

¶9           St. Germain reported that Joseph did not understand the extent of Jonathan’s special needs related to his deafness. She testified that Joseph had failed to remedy the circumstances that had rendered the children dependent and that the children were not safe in the parents’ care, despite the services CPS had provided. Michael Vetter, clinical and resource director for Child and Family Resources, also opined that the parents were not currently capable of providing a safe and stable household for the children and that further clinical intervention would not change his conclusion.

¶10           In its nine-page minute entry, followed one month later by formal findings of fact and conclusions of law, the juvenile court entered extensive factual findings and legal conclusions. The court specified that it had

fully considered the evidence and testimony presented at the contested severance hearing . . . together with the testimony and evidence presented at the Permanency Planning Hearing . . . [that it had had] the unique ability to observe the witnesses during their testimony . . . [and had] read and fully considered the written closing arguments of respective counsel.

The court specifically found, as § 8-533(B)(3) and (B)(8)(c) requires, that ADES had made diligent efforts to provide reunification services; Joseph's mental illness had prevented him from discharging his parental responsibilities; he had not remedied the circumstances causing the children's dependency and he would not be able to parent them effectively in the near future; and termination was in the children's best interests.

¶11 Notably, the juvenile court acknowledged that three psychologists had opined specifically that the parents have a longstanding diagnosis of serious psychotic disorders "from which they cannot recover nor is the condition curable" and that counsel for the parents "have avoided confronting the brutal reality" that Dr. Hirdes, their own retained psychologist, "came to the same material and relevant conclusions [as the state's psychologists] concerning the parent[s'] ability to parent in a consistent and safe manner over a prolonged period of time without significant interventions and outside support." The court also noted that the parents' counsel had not challenged the "expert opinions, findings, perceptions or conclusions" and that Hirdes's opinions had been rendered just before the severance hearing, when the parents had been "fully compliant with their medical and drug regimes as well as having over the past two years demonstrated their ability to maintain a stable mental health condition with the help of various clinicians and professionals."

¶12 The record contains abundant evidence to support the juvenile court’s findings with respect to the statutory grounds for severance and the best interests of Nathan and Jonathan. Given the court’s detailed findings, we need not ““rehash[] the . . . court’s correct ruling”” here. *Jesus M.*, 203 Ariz. 278, ¶ 16, 53 P.3d at 207-08, *quoting State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Although we adopt the court’s ruling, we address two additional, specific issues Joseph has raised.

¶13 First, Joseph suggests the juvenile court improperly relied on certain testimony “without due consideration” of the arguably favorable testimony of the professionals who had spent years with him. But, the juvenile court, not this court, resolves any conflicts in the evidence, and it did so here. *See In re Pima County Dependency Action No. 93511*, 154 Ariz. 543, 546, 744 P.2d 455, 458 (App. 1987) (as fact-finder in termination proceedings, court in best position to weigh evidence and judge witness credibility). In its minute entry, the court noted the “dispute between the various professional witnesses as to their respective perceptions of these parents and their ability to care for these children in the future.” The court pointed out Dr. Hirdes had observed that Joseph had shown ““increased levels of cooperation and general improvements in his use of basic parenting techniques,”” particularly when he was supervised or in the presence of ““cues by parent aides or other competent supervisors,”” thus explaining, at least in part, the inconsistency in the testimony.

¶14 Second, Joseph challenges the juvenile court’s determination that termination of his parental rights was in the children’s best interests, arguing that Nathan and Jonathan

probably will not be adopted by the same family. To sustain its burden of establishing termination is in a child's best interests, ADES must prove, by a preponderance of the evidence, that the child either would benefit from the severance or be harmed if the parental relationship continued. *See Mary Lou C. v. Ariz. Dep't of Econ. Sec.*, 207 Ariz. 43, ¶ 19, 83 P.3d 43, 50 (App. 2004); *see also Kent K.*, 210 Ariz. 279, ¶ 22, 110 P.3d at 1018 (best interests to support termination of parental rights must be established by preponderance of evidence). There was more than sufficient evidence to support the court's best interests finding. St. Germain testified that Nathan's and Jonathan's foster families, with whom they had bonded, are willing to adopt them. *See Audra T. v. Ariz. Dep't of Econ. Sec.*, 194 Ariz. 376, ¶ 5, 982 P.2d 1290, 1291 (App. 1998) (juvenile court could consider whether current adoptive placement existed, whether child adoptable, or whether existing placement meeting needs).

¶15 In addition, Jonathan's foster family had continued to meet his special needs related to his deafness. *See id.* St. Germain also testified that termination is in the children's best interests and that they would "face further emotional neglect or physical abuse if returned to the parents." She had reported previously that the children have "lacked permanency [since February 2006], and it is now time to work towards providing this essential element to their lives." It is clear from the record that the court was aware the children had been placed with separate potential adoptive families, a factor we can infer it considered when it determined termination of Joseph's rights was in the children's best

interests. “We are mindful that our function on review is not to reweigh the evidence before the juvenile court or supersede its assessment of the evidence with our own.” *See Ariz. Dep’t of Econ. Sec. v. Oscar O.*, 209 Ariz. 332, ¶ 14, 100 P.3d 943, 947 (App. 2004).

¶16 The record amply supports the juvenile court’s termination of Joseph’s parental rights to Nathan and Jonathan. We therefore affirm.

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JOSEPH W. HOWARD, Chief Judge

CONCURRING:

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PHILIP G. ESPINOSA, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge